STATE OF ALASKA

IBLA 77-288 Decided July 25, 1979

Appeal from decision of Alaska State Office, Bureau of Land Management, partially rejecting airport conveyance application A-050631.

Set aside and case remanded.

1. Administrative Procedure: Generally -- Constitutional Law: Due Process -- Contests and Protests: Generally -- Rules of Practice: Private Contests -- Words and Phrases

   "Person." Regulation 43 CFR 4.450-1 specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on the applicability of the due process clause of the Constitution to either claimant. A State is a "person" within the meaning of this private contest regulation.

2. Administrative Procedure: Standing -- Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Rules of Practice: Private Contests -- State Selections

   The State of Alaska has a sufficient interest in land by virtue of its applications for an airport conveyance or by its selection application to have standing to initiate private contests against conflicting Native allotment applications.

3. Administrative Procedure: Adjudication -- Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments

   State of Alaska applications for prior-filed airport conveyances of land needed

> for an existing airport should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

APPEARANCES: Martha Mills, Esq., Assistant Attorney General, State of Alaska, for appellant; Joel Bolger, Esq., Alaska Legal Services Corporation, for Nels Anderson, Sr., Native allotment applicant; Nicholas McKean, Esq., McCarry and McCarry, Anchorage, Alaska, for Ralph Sorensen, Native allotment applicant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The State of Alaska, Department of Public Works, Division of Aviation (ADA), appeals from the February 24, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), denying in part ADA's application A-050631 for conveyance of Tract II in Dillingham, Alaska. The Federal Aviation Administration (FAA) applied for certain land on November 25, 1959, pursuant to section 16 of the Federal Airport Act of May 13, 1946, 60 Stat. 179, 49 U.S.C. § 1115 (1970), to be transferred to the State for addition to the Dillingham airport. Tract II contains approximately 65 acres and is located in Lot 1, U.S. Survey 5688 and a portion of Lot 28, U.S. Survey 4980.

The application was rejected as to those lands in conflict with Native allotment applications A-057915 (Anderson), AA-6551 (Sorensen), AA-8200 (Timmerman), and AA-8201 (Wheeler). 1/ The decision was based on 43 CFR 2091.6-3 which provides: "Lands occupied by Indians, Aleuts and Eskimos in good faith are not subject to entry or appropriation by others." The State Office held that the Native allotment applicants' occupancy commenced prior to the filing of the airport conveyance application and noted that the field examiners recommended approval of the Native allotments. Consideration of this appeal has been delayed pending decision by the United States Court of Appeals for the Ninth Circuit in Pence v. Andrus, 586 F.2d 733 (1978), and also because of various motions filed in behalf of Anderson and Sorenson, including a return of the case files to the Alaska BLM office for perusal by the parties.

1/ Nels Anderson filed his application March 7, 1967, claiming occupancy from May 21, 1929. Ralph Sorensen's application was received October 21, 1971, and he asserts occupancy since 1952. Katie Timmerman and Loretta Lee Wheeler filed applications October 19, 1972, claiming occupancy commencing in August 1956, and May 1, 1959, respectively. Presumptively the applications were timely filed with BIA before the repeal of the Native Allotment Act.

The State constructed the Dillingham airport in 1950 and 1951. The section 16 airport application was filed in 1959, apparently to protect the approach and departure routes to the airport. By letter of May 28, 1962, ADA and the State Division of Lands requested that the airport lands be included in State selection applications A-054379 and A-054380 adjacent to the airport lands filed in 1961, which originally excluded the lands in the airport application. It was noted that airport leases had been issued, A-025408 and A-042668, and that another application was pending, A-056725. The letter stated that when tentative approval of the State selection applications issued, the leases would be relinquished. ADA later verbally requested that the section 16 application continue to be processed. BLM issued a letter of commitment July 14, 1964, to the FAA for lands in Tract II which were not in conflict and are not involved in this appeal. In 1969 the Secretary of the Interior issued a land freeze order in Alaska. This was followed by enactment of the Alaska Native Claims Settlement Act (ANCSA), December 18, 1971, 85 Stat. 688, 43 U.S.C. §§ 1601-1628 (1976). Field examinations for the above Native allotments were conducted in 1975, and approval was recommended. On February 24, 1977, BLM informed the four Native allotment applicants that their applications warranted final certificates but gave them 30 days to object to the legal descriptions. Two of the applicants have done so. Patents have not issued for any of the land.

In the statement of reasons for appeal, the State asserts that the Native allotments are not yet final and that it "intends to contest the sufficiency of the Native allotment applications." Specifically, the State contends that each of the four Native allotment applications is factually defective. The Anderson application does not indicate the applicant's age, and shows four houses located on the land. The State suggests Anderson may not meet the age and/or potentially exclusive use and occupancy requirements for a Native allotment. The State and Anderson, however, have stipulated that a portion of Anderson's allotment application is not in conflict.

The Sorensen application is attacked on the same grounds and on the basis that prior to 1960, he used the land only 2 months a year, while attending school the remaining months. The State further points out that Sorensen has disagreed with BLM's description of the land, noting that an applicant for a Native allotment cannot amend his application to include new or additional lands but can only correct an erroneous description. Raymond Paneak, 19 IBLA 68 (1975); George Ondola, 17 IBLA 363 (1974).

The State argues the Timmerman and Wheeler applications are defective because they were filed with BLM after passage of ANCSA, and because use and occupancy began after use of the airport, resulting in conflicting uses and possible easements for air space in favor of the State. In addition, the State asserts that the proximity of the dates

of Wheeler's use and occupancy and the State's application may necessitate proof to establish which occurred first.

The next claim the State makes is that the airport "was in existence and use long before the use and occupancy dates of the Native applicants. Therefore, the land was not vacant and available for Native allotments pursuant to [43 CFR] § 2561.0-3." The State cites 43 CFR 2561.1(d) as requiring rejection of allotment applications which infringe on areas of Native community use, and claims "the airport could be considered an area of community use."

Next, the State argues that although 43 CFR 2561.1(e) requires rejection of subsequent applications which conflict with acceptable Native allotment applications, the State airport conveyance application was filed before any of the Native allotment applications. Because of this, the State asserts its application is not a subsequent conflicting application, and while recognizing that the Native allotment applications relate back to the date of use and occupancy, "the State applications should not be rejected on the basis of 2561.1(e) until the Native allotment applications are finally adjudicated."

Finally the State asserts that its right to due process has been violated. The State received no notice from BLM concerning the status of the Native allotment applications, nor has the State had any opportunity to cross-examine the applicants and their witnesses or to contest the approval of the Native allotments. According to the State, "[t]he due process rights recognized in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), should also apply to the State where conflicting Native allotment applications and State applications or selections exist." The State asks for a hearing "to protect the due process rights of all the parties." In a motion for judgment, received December 19, 1978, the State again requests a hearing on the Native allotments in which it can participate as a party.

In response to a request from Lucy Lowden of the Alaska Legal Services Corporation, on behalf of Anderson, the Board ordered the record be returned to the BLM State Office in Alaska and made available to the Native allotment applicants and the State for inspection. Counsel for Anderson 2/ submitted an "Answer" to the State's arguments against Anderson, asserting "there are no factual or legal defects in his [Anderson's] application which would compel reversal of the BLM decision." He states Anderson has adequately demonstrated compliance with the Native Allotment Act of 1906, 34 Stat. 197, as amended, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed, saving pending applications by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)). He also submits an affidavit from Anderson stating his age to be 62 years. Finally, citing South Carolina v. Katzenbach, 383 U.S. 301 (1966), he argues the State

2/ Joel Bolger has entered an appearance as attorney for Anderson, replacing Lucy Lowden.

is not a "person" within the meaning of the due process clause in the Constitution, and even if it was, the State has no property interest here which merits protection.

By letter of February 20, 1979, counsel for Ralph Sorensen entered an appearance in this appeal and an objection to the State's motion for judgment. He further requested that copies of all documentation in the case be forwarded to him to enable him to file an answer on behalf of Sorensen. By order of March 5, 1979, 40 days were granted in which any party could file further pleadings. At counsel's request, on April 12, 1979, the time for submission of pleadings was extended 30 days.

An answer and two affidavits were filed on behalf of Sorensen. The State responded to the answer. No further pleadings have been filed. In his answer Sorensen asserts that the State's appeal was not timely filed and should be dismissed pursuant to 43 CFR 4.401 and 4.411. He further claims that the State has alleged no facts requiring the Native allotment to be rejected or that warrant granting a hearing. Specifically, he points out that he was 21 in 1955, and not a minor as the State suggested. He states that the fact that he was away at school during much of the years between 1952 and 1960 does not preclude a finding that he made substantial, albeit seasonal, use and occupancy of the land. As for the State's allegation that his use has not been exclusive, Sorensen asserts that it has been, that the field examiner verified that fact, and that there has been no evidence presented to the contrary. He asserts that he has occupied the land continuously since 1960.

Sorensen's next point is that neither the Federal Airport Act of May 13, 1946, supra, nor the relevant regulations, 43 CFR Part 2640, under which these lands were applied for, segregates or withdraws lands pending a determination of whether to convey them. He notes that under other statutes and regulations (43 CFR 2561.1(e); Act of May 24, 1926, 45 Stat. 728, as amended, 49 U.S.C. § 211; 43 CFR 2911.2-3), specific provision is made for such segregation or withdrawal. He argues had Congress or this Department desired segregation of such lands, they would have said so; therefore, the lands were never segregated. Under this view, even if Sorensen's qualifying use and occupancy did not commence until 1960, as the State claims, the lands were open and he has met the requirements for a Native allotment.

Sorensen next asserts that the slight amendment to the description of his lands is a legal issue to be resolved by the Department, and that BLM officers have stated that it is reasonable. He states that the land is still vacant, as the only connection between it and the airport is that planes fly over the land. This lack of "use" by the airport prevents the land from qualifying as an area of Native community use as urged by the State. He requests that the State be denied a hearing as the State lacks any property interest which would

entitle it to due process protection and has shown no factual dispute to exist.

In reply the State only submitted evidence to prove that its appeal was timely filed. This evidence showed that the appeal was filed within 30 days after the State received the BLM decision. We accept the State's evidence and will proceed to consider this appeal.

Because of our disposition of this case we need not, at this point, reach the merits of the arguments of the State or the Native allotment applicants concerning the validity of the Native allotment applications. There are, however, several points raised by the parties which we will address.

The Court of Appeals for the Ninth Circuit recently held that the regulations at 43 CFR 4.451 et seq., dealing with Government contests, "facially" met the requirements of due process outlined in Pence v. Kleppe, supra (Pence I), for Native allotment applicants. Pence v. Andrus, supra, (Pence II). In Pence I the court found Native allotment applicants' property interest in their allotments sufficient to entitle them to due process before an application is denied. It would be inconsistent with the spirit of those decisions to refuse the State a similar opportunity to be heard where it claims an adverse interest in lands covered by Native allotment applications. State of Alaska, 40 IBLA 79 (1978).

[1] Counsel for Anderson, however, asserts that the State is not entitled to due process protection and a hearing because it is not a "person" within the meaning of the due process clause. The decision it cited, South Carolina v. Katzenbach, supra, involved the State's challenge of the Federal Voting Rights Act of 1965 and Federal enforcement procedures against the State. The State was acting in its governmental capacity, rather than in a proprietary capacity, and the ruling was addressed to that capacity. Here, however, the State is asserting claims in a proprietary, as well as any governmental, capacity. It is irrelevant, however, to our disposition of this appeal whether the State is a "person" within the meaning of the due process clause of the United States Constitution. What is most relevant is the meaning of that word within the Departmental regulations where it is used. The most pertinent regulation here, 43 CFR 4.450-1 provides in part:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land . . . may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management.

This regulation specifically gives persons with an adverse interest in land a right to contest the adverse claim. It does not depend on

the applicability of the due process clause to either claimant, although concepts of due process and fairness are implicit in the regulation. In determining the meaning of "person" as used in various Federal statutes, the Supreme Court has stated: "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment, Ohio v. Helvering, 292 U.S. 360, 370; Georgia v. Evans, 316 U.S. 159, 161." Likewise, here in the context of public land law adjudication where there may be various conflicting rights and interests based upon specific Federal legislation granting such rights, States have always been recognized in the proprietary capacity as "persons" within the meaning of the private contest regulations, allowing them to initiate private contests against conflicting claimants. State of Alaska, 41 IBLA 315, 86 I.D. (1979); State of Alaska, 40 IBLA 79 (1979); see also Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441, 501 (1973); State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1970), aff'd Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 837 (1976); State of California v. E. O. Rodeffer, 75 I.D. 176 (1968); State of Louisiana v. State Exploration Co., 73 I.D. 148 (1966).

[2] Both Anderson and Sorensen raise the question of whether or not the State has a sufficient claim of entitlement to the land in question to justify a hearing. Both are referring to the property interest which triggers due process. The property interest required for a private contest is "an interest which must be grounded on a specific statutory grant." United States v. United States Pumice Co., 37 IBLA 153, 159 n. 4 (1978). The State application was filed pursuant to 49 U.S.C. § 1115 (1970) which provides:

> (a) Whenever the Administrator [of FAA] determines that use of any lands owned or controlled by the United States is reasonably necessary for carrying out a project under this chapter, or for the operation of any public airport, he shall file with the head of the department or agency having control of such lands a request that such property interest therein as he may deem necessary be conveyed to the public agency sponsoring the project in question or owning or controlling the airport. Such property interest may consist of the title to or any other interest in land or any easement through or other interest in air space.
>
> (b) Upon receipt of a request from the Administrator under this section, the head of the department or agency having control of the lands in question shall determine whether the requested conveyance is inconsistent with the needs of the department or agency, and shall notify the Administrator of his determination within a period of four months after receipt of the Administrator's request. If such department or agency

> head determines that the requested conveyance is not inconsistent with the needs of that department or agency, such department or agency head is authorized and directed, with the approval of the President and the Attorney General of the United States, and without any expense to the United States, to perform any acts and to execute any instruments necessary to make the conveyance requested; but each such conveyance shall be made on the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands in question are not developed, or cease to be used, for airport purposes. [Emphasis supplied.]

On July 14, 1964, a letter of commitment was issued by BLM for some of the land in Tract II. While the commitment letter excluded lands for which there were conflicting claims it does indicate a determination by the Department that in the absence of conflicting applications, the airport conveyance would not be inconsistent with the needs of the Department of the Interior. This determination, read with the language of the statute directing the Department or agency head to make the conveyance gives the State of Alaska a sufficient interest in the land to support the bringing of a private contest provided all other requirements for such contests are met.

Furthermore, the lands here are also included in State selection applications. Irrespective of the question of whether or not the filing of the airport conveyance application segregated the lands, a State selection application for "vacant, unappropriated and unreserved" lands does segregate the lands. Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958). While it is a question of fact whether these lands were available at the time the State selection was filed, the two applications of the State give it a sufficient interest in the lands to support a private contest. See State of Alaska, supra, n. 2 at p. 83; Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (December 12, 1978).

We have recently discussed at some length the State of Alaska's standing to challenge Native allotment applications in conflict with its selections under the Alaska Statehood Act, including its standing under the Department's rules of procedure to initiate private contests against the Native claims in conflict with its applications. State of Alaska, supra. We adhere to that conclusion.

[3] In response to arguments somewhat similar to those made by the State here that it was not afforded notice of the conflicting claims or an opportunity to challenge them, we ruled that it was not proper procedure for BLM to reject a State's application without first affording it an opportunity to contest the conflicting claims before its application was rejected. Id. It was also premature for BLM to reject the State's prior-filed airport applications here for

lands which the State asserts are needed for the existing airport, especially where they are supported by alternative selection applications, without affording the State notice of the conflicting claims and an opportunity to challenge them. As in that case, we shall set aside the decisions to afford the State its opportunity to contest the conflicting claims if it continues in its desire to do so. When the case records are returned to BLM, it shall give notice of their return to the State and afford it time within which to bring private contest proceedings against the Natives' conflicting claims.

There is an additional factor in this case which was not involved in the afore-cited case, but was involved in two prior State of Alaska cases, 40 IBLA 79 and 40 IBLA 118 (1979); namely, the State's allegation concerning the community use and need of the airport vis-a-vis the individual allotment applicant's use. Sorensen especially disputes this in his arguments that the State should not be entitled to a hearing. However, it is an issue which relates not only to the adequacy of the use and occupancy of the individual Native, but also to whether an allotment should be made in the exercise of the Secretary's discretion if the alleged community or public need for the land for the airport is found. As we have indicated, at 40 IBLA 121:

> Even assuming the Natives satisfactorily show that the statutory preconditions for allotment have been satisfied, allowance of their applications under the 1906 Act remains in the discretion of the Secretary of the Interior. Among considerations to be made in determining whether that discretion should be exercised to allow or to reject the applications is the impact upon the Natives. This would include what use they had made in the past, how deprivation of that use would affect them, the extent of use and occupancy, including whether they had improvements on the land or adjoining lands which would be affected, and other matters reflecting upon their equities. On the other hand, factors relating to the public interest must be weighed. These go to the community's need and use for the airport and the interests of the State representing the larger State-wide community.

These issues are best resolved only after a hearing of which all interested parties have been given notice. Thus, we must reject Sorenson's contention that the State is not entitled to a hearing or an opportunity to challenge his and the other claims. As we have indicated, we are making no rulings on the merits of the respective claims by our action here.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision appealed from is set aside and the case remanded for further proceedings consistent with this opinion.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge